

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

USA,

Plaintiff,

v.

LIANG CHEN,  
DONALD OLGADO,  
WEI-YUNG HSU, and  
ROBERT EWALD,

Defendants.

Case No. 17-cr-00603-BLF-1

**ORDER DENYING MOTION TO  
SUPPRESS EVIDENCE**

[Re: ECF 114]

Defendants Liang Chen, Donald Olgado, Wei-Yung Hsu, and Robert Ewald are charged with one count of conspiracy to commit theft of trade secrets, 18 U.S.C. § 1832(a)(5), and eleven counts of possession of stolen trade secrets, and aiding and abetting, 18 USC §§ 1832(a)(2), (3). Indictment ¶¶ 11–20, ECF 1. They filed a motion to suppress evidence seized as a result of two search warrants. *See* Mot., ECF 114. On November 10, 2020, this Court granted a *Franks* hearing on the issue of the search warrant affidavit’s omission of a denied Temporary Restraining Order (“TRO”) application in the state court civil litigation between Applied Materials, Inc. (“Applied Materials”) and Defendants.

The Court held an evidentiary hearing on March 16, 2021, at which it heard witness testimony from Federal Bureau of Investigation (“FBI”) Special Agent Ann Trombetta (“SA Trombetta”). For the reasons set forth below, Defendants’ motion to suppress evidence is DENIED.

**I. EVIDENCE PRESENTED TO THE COURT**

SA Trombetta was called to testify by the Government, and Defendant Olgado cross-examined

1 her at length. The testimony and admitted exhibits presented to the Court are summarized below.

2 **A. Direct Examination of SA Trombetta**

3 SA Trombetta testified that she is currently a supervisory special agent with the FBI. She  
4 confirmed that she prepared the search warrant affidavit at issue in this case.

5 SA Trombetta testified about her background. She worked as an attorney before joining the  
6 FBI. She was very briefly a deputy district attorney in Mendocino County before working as a  
7 public defender in Yuba County. She joined the FBI in January 2010, and she underwent a 21-  
8 week course at Quantico, in Virginia, where she received training on all aspects of law and  
9 terrorism. After finishing her training at Quantico, she was assigned to the San Francisco field  
10 division and then the San Jose resident agency from October 2010 until May 2016. She was again  
11 stationed in San Jose from March 2018 through approximately March 2019. In between, she was  
12 stationed at FBI headquarters in Washington, D.C. After returning to San Jose for one year, she  
13 transferred to the Santa Rosa office where she currently supervises between 10-13 people as a  
14 supervisory special agent.

15 Back in 2012, SA Trombetta was assigned a trade secret theft investigation involving these  
16 Defendants when she was a member of the Violent Crimes Against Children and Intellectual  
17 Property Rights Unit. SA Trombetta testified that she was told in January 2013 to go to the United  
18 States Attorney's Office in San Jose for a meeting about a new potential intellectual property  
19 rights investigation. She testified that the alleged victim of the trade secrets theft was Applied  
20 Materials, and the investigation was in its early stages. SA Trombetta testified that her former  
21 supervisor, two assistant United States attorneys, and inside and outside counsel for Applied  
22 Materials were present for the meeting. SA Trombetta testified that the meeting lasted  
23 approximately one or two hours.

24 SA Trombetta testified that Applied Materials believed that Defendants had stolen trade  
25 secrets during their employment with Applied Materials. SA Trombetta testified that she  
26 "vaguely" recalled discussion about the existence of a civil suit during this meeting. SA Trombetta  
27 testified that she received a binder that was approximately 1.5 inches thick at the meeting. She  
28 testified that inside the binder, Applied Materials had laid out its investigation into Defendants.

1 Inside the binder were court records, copies of emails, statements from involved parties, and  
2 PowerPoints connected to the trade secrets.

3 SA Trombetta testified that, after the meeting, she and assistant United States attorney  
4 (“AUSA”) Dave Callaway read through the binder and determined that their next step would be to  
5 execute search warrants in order to determine whether or not further evidence existed. SA  
6 Trombetta testified that, based on the evidence they had at that point, they needed a search warrant  
7 for the email accounts of Defendant Olgado and two other individuals and a search warrant for  
8 Defendant Olgado’s residence. After SA Trombetta drafted the search warrant affidavit, she  
9 discussed it with AUSA Callaway, and it was then submitted to a magistrate judge. The magistrate  
10 judge then signed the search warrant.

11 SA Trombetta was then shown Government Exhibit 1, the application and affidavit for  
12 search warrant signed by Magistrate Judge Paul Grewal. She identified that she had submitted this  
13 to the magistrate judge and recognized the signatures of Judge Grewal and AUSA Callaway. SA  
14 Trombetta was then shown Government Exhibit 2, the search warrant for 831 Melville Avenue,  
15 Palo Alto, California. SA Trombetta testified that she remembered this document, too. SA  
16 Trombetta also testified that she had reviewed the search warrant affidavit prior to this hearing.

17 SA Trombetta then testified in depth about Government Exhibit 1. She testified regarding  
18 the section titled, “Facts Supporting Probable Cause,” on page 3. SA Trombetta testified that she  
19 does not put every fact known in the investigation into the search warrant affidavit. She then read  
20 a sentence from paragraph 4 of the affidavit: “Because this affidavit is submitted for the limited  
21 purpose of establishing probable cause in support of the application for a search warrant, it does  
22 not set forth every fact that others or I have learned during the course of this investigation.”  
23 Government Ex. 1 ¶ SA Trombetta testified that she does not put every fact learned in the  
24 investigation into the search warrant because it would be a very long warrant, and this was more  
25 limited in nature in order to establish the probable cause and reasonable belief they had to request  
26 to search. SA Trombetta testified that the requested search was tailored to specific items they were  
27 trying to look for in connection with the search.

28 SA Trombetta then testified about paragraph 14 of the search warrant affidavit, which

1 referenced emails provided to her by Applied Materials. SA Trombetta testified that these emails,  
2 mostly from Defendants' personal email accounts, laid out the conspiracy she was investigating.  
3 She testified that she cited approximately 15 emails in the subsequent paragraphs. SA Trombetta  
4 read the first three sentences of paragraph 14:

5  
6 Applied Materials provided me with e-mails, files, and documents turned over by Olgado  
7 to Applied Materials pursuant to a Stipulated Temporary Restraining Order (TRO)  
8 between Olgado and Applied Materials, as well as additional e-mails and other documents  
9 Applied Materials found within its own systems. In a letter to Bradford Newman, counsel  
10 for Applied Materials, Erin McDermit, counsel for Olgado, stated that Olgado had  
11 searched his "personal computer as well as a DVD with Applied documents in Mr.  
12 Olgado's possession." The letter stated that the emails were located by Olgado searching  
13 his sent mailbox folders, as "he did not have emails in his inbox because he deleted emails  
14 from the other defendants in early December, 2012."

15 Government Ex. 1 ¶ 14. Agent Trombetta testified that she included this information because she  
16 needed to explain to the judge how she came into possession of these personal emails. She  
17 testified that since she had just started the investigation and not yet written a search warrant for  
18 anything, she shouldn't normally have been in possession of those emails and therefore needed to  
19 explain them. SA Trombetta affirmed that all of the emails were provided to her by Applied  
20 Materials. SA Trombetta testified that she understood that the emails were from both Applied  
21 Materials's internal email system and from the stipulated TRO. SA Trombetta testified that this  
22 was the only reference to the stipulated TRO in the search warrant affidavit. She testified that she  
23 did not otherwise discuss the civil litigation in the search warrant affidavit.

24 SA Trombetta then reviewed Government Exhibit 5, a copy of the stipulated TRO between  
25 Applied Materials and Defendant Olgado. SA Trombetta testified that she was provided this  
26 document in the binder from Applied Materials at the initial investigation meeting. The caption of  
27 the document is "Stipulated Temporary Restraining Order, Evidence Preservation Order, and  
28 Order Temporarily Staying Litigation as Between Plaintiff and Donald Olgado." Government Ex.  
5. SA Trombetta testified that she understood that Defendant Olgado had agreed to have no further  
dealings with anything related to Applied Materials. SA Trombetta then read paragraph 2(c)(1),  
which stated that

1 Within forty-eight (48) hours after the entry of this Order, Olgado shall...immediately  
2 return all hard copy files, documents, and other tangible property in his possession that  
3 belong to Applied Materials, as well as all communications (including emails and text  
4 messages) sent or received by and between him and any other person or entity, and all  
5 documents (including meta-data), relating to attempts by any Defendant to commercialize  
6 Applied Materials' MOCVD technology and processes for LEDs and Power Devices and  
7 or that relate to the formation, capitalization, investment, structure or operations of the  
8 entity or product which Defendants refer to as Envision."

9 Government Ex. 5 ¶ 2(c)(1). SA Trombetta stated that this passage spoke to how she obtained  
10 possession of many of the emails from Olgado's personal email account. SA Trombetta then read  
11 another sentence from this exhibit: "All further litigation between Applied Materials and Olgado is  
12 stayed through February 1, 2013." Government Ex. 5 at 5. SA Trombetta testified that this  
13 document was signed by Defendant Olgado and stamped by state court Judge Kevin E.  
14 McKenney. SA Trombetta testified that she relied on this document when drafting the search  
15 warrant affidavit to establish how she came in possession of personal emails without having  
16 executed a prior search warrant.

17 SA Trombetta next reviewed Government Exhibit 8, titled "Order Granting Plaintiff  
18 Applied Materials, Inc.'s *Ex Parte* Application for Temporary Restraining Order, Evidence  
19 Preservation Order, Expedited Discovery, and Order to Show Cause Re Issuance of a Preliminary  
20 Injunction." SA Trombetta stated that she did not recall having any exposure or having obtained a  
21 copy of this document at the time she prepared the search warrant affidavit. She testified that she  
22 did review this document for this hearing. SA Trombetta testified that this document indicated that  
23 the request for a TRO had been denied. SA Trombetta also testified that multiple paragraphs were  
24 crossed out by hand in this document, and there were many handwritten notes in the margins. She  
25 testified that, in her experience, it was not normal to see this much handwriting on a court  
26 document. She testified that she thought she would remember seeing a document with this kind of  
27 handwriting had she seen in in 2013, but she did not remember having seen this document. She  
28 testified that she did not believe she knew about this document when she prepared the search  
warrant affidavit. SA Trombetta also testified that she did not go to the clerk's office for the Santa  
Clara County Superior Court and review the civil docket. She stated that she did not summarize  
the civil docket in the search warrant application.

1 SA Trombetta was next shown Government Exhibit 3, a copy of the report she wrote  
2 following the initial January 2013 investigation meeting. SA Trombetta testified that there was no  
3 reference to the denied TRO in this report. SA Trombetta reviewed Government Exhibit 4, a copy  
4 of her handwritten notes from the January 2013 meeting. This exhibit also did not mention the  
5 denial of the TRO. SA Trombetta testified that she did not purposely leave out a reference to the  
6 denied TRO in either her report or handwritten notes.

7 SA Trombetta reviewed Government Exhibit 6, a January 7, 2013 letter to Mr. Newman,  
8 attorney for Applied Materials, from Ms. McDermit, attorney for Defendant Olgado. SA  
9 Trombetta testified that this was contained in the binder given to her by Applied Materials. The  
10 letter read, in part, "Pursuant to the stipulated temporary restraining order ('TRO') between Mr.  
11 Olgado and Applied Materials, Inc. ('Applied'), enclosed please find a zip disk containing a PDF  
12 list of Mr. Olgado's claimed personal and Applied files from Mr. Olgado's personal computer as  
13 well as a DVD with Applied documents in Mr. Olgado's possession." Government Ex. 6 at 1. SA  
14 Trombetta also testified that Exhibit 6 ended with an offer from Defendant Olgado to meet with  
15 Applied Materials to discuss a potential resolution of his involvement in the lawsuit. Government  
16 Ex. 6. SA Trombetta testified that there was no reference to the denial of the TRO, but there was a  
17 reference to the stipulated TRO between Defendant Olgado and Applied Materials. SA Trombetta  
18 testified that she has never spoken with Ms. McDermit, so she could not have asked her to leave  
19 the denial of the TRO out of this letter.

20 SA Trombetta reviewed Government Exhibit 7, also provided by Applied Materials. It was  
21 a summary of emails obtained by Applied Materials through the TRO and their internal system in  
22 which Defendants discussed the trade secrets theft. It listed, in chronological order, relevant emails  
23 and events along with the source of the information. Each entry on the chart was assigned a Tab  
24 number, starting with Tab 1. SA Trombetta testified that this document aided her in preparing her  
25 search warrant affidavit. SA Trombetta testified that Tab 42 stated, "Olgado signs Stipulated  
26 Temporary Restraining Order." Government Ex. 7 at 10. SA Trombetta testified that, at the end of  
27 the chart, there was a list of additional documents, including declarations from Defendants Chen,  
28 Hsu, and Ewald that had been filed in opposition to Applied Materials's application for a TRO.

SA Trombetta testified that the document did not include a reference to the denial of the TRO. SA Trombetta testified that she did not know about the denial of the TRO, and therefore she could not ask Applied Materials to leave this fact off the timeline.

To close her direct testimony, SA Trombetta stated that she did not intentionally leave out the denial of the TRO in the search warrant affidavit submitted to the magistrate judge. She testified that she did not make reference to Defendants Chen, Ewald, or Hsu when she mentioned the stipulated TRO. She testified that she specified that the stipulated TRO was between Applied Materials and Defendant Olgado. SA Trombetta testified that she there was no intent on her part to deceive the judge or omit anything significant.

**B. Cross-Examination of SA Trombetta**

SA Trombetta testified that she did selectively choose what to put in the search warrant affidavit, based on all the evidence. Some things were included, and some were left out. She rejected Defense counsel's characterization of her job when writing a search warrant as just getting a ball across a goal line, presenting a certain amount of information to demonstrate probable cause. She testified that she viewed her job as including relevant information known to her at the time that will provide the judge with a comprehensive picture of why she is trying to search and what she is trying to search. She testified that she would never try to manipulate the inferences the judge would draw or tell half-truths.

SA Trombetta again reviewed Government Exhibit 3, her report from the initial January 2013 investigation meeting. She confirmed the people present at the meeting. SA Trombetta testified that she realized that Paul Hastings, the law firm serving as outside counsel for Applied Materials, was representing Applied Materials's interests. She also confirmed that she understood that this meeting was Applied Materials's opportunity to explain why it wanted the Government to investigate this matter. She testified that she and the other government representatives had an opportunity to ask questions before they reviewed the binder and discussed among themselves whether they believed they should open an investigation into the matter.

SA Trombetta restated that she did have a vague recollection of the civil case being mentioned and stated it was her experience that this type of matter always had an associated civil



1 case. She testified that she had a vague recollection that Applied Materials had filed a civil suit  
2 against Defendants. She testified that she knew the civil suit involved an application by Applied  
3 Materials for a TRO. She believed that she knew that Defendants had denied the allegations. SA  
4 Trombetta reviewed Government Exhibit 3 and confirmed she had written that Defendants denied  
5 the allegations.

6 SA Trombetta testified that she knew that before July 2012, Defendant Chen had been  
7 authorized by Applied Materials to market the MOCVD technology, and until approximately  
8 August 2012, Defendant Chen had been instructed to find buyers or investors. SA Trombetta  
9 testified that she knew Mark Pinto was the executive vice president (“EVP”) at Applied Materials.  
10 She testified that Applied Materials representatives had told her that Applied Materials had filed  
11 for a TRO in the civil case. She testified that she also had reason to know that Applied Materials  
12 had sought relief in state court by filing a lawsuit and asked a judge to do something. SA  
13 Trombetta testified that she is no longer the case agent on this matter.

14 SA Trombetta testified that the binder she received from Applied Materials contained  
15 declarations that had been filed in the civil case and the stipulated TRO. SA Trombetta reviewed a  
16 document that was identical to Government Exhibit 7, the chronological chart of emails and  
17 events. She next reviewed Defense Exhibit 26, the Chen Declaration in opposition to Applied  
18 Materials’s application for a TRO. SA Trombetta confirmed she had this document before  
19 applying for the search warrant in this case. She confirmed she had read at least the first page. SA  
20 Trombetta next reviewed Defense Exhibit 27, the Hsu Declaration in opposition to Applied  
21 Materials’s application for a TRO. She confirmed she had this document before applying for the  
22 search warrant and had read at least the first page. She also confirmed it contained a hearing date  
23 of December 19, 2012. Next was Defense Exhibit 28, the Ewald Declaration in opposition to  
24 Applied Materials’s application for a TRO, and SA Trombetta confirmed she had this document  
25 before applying for the search warrant and read at least the first page. SA Trombetta then reviewed  
26 Defense Exhibit 29, the Declaration of Mark Pinto in support of Applied Materials’s application  
27 for a TRO. She confirmed the stated hearing date on this document was December 14, 2012, and  
28 the first page stated that the case was filed on December 13, 2012. She stated that the document



1 contained the name of Mr. Newman and the Paul Hastings law firm, and she knew the same  
2 lawyers meeting with her in January 2013 were the same lawyers involved in the civil case  
3 between Applied Materials and the four Defendants. SA Trombetta confirmed that Government  
4 Exhibit 7, the email chronology, contained references to two other declarations and they, like the  
5 other four declarations she reviewed, informed her that there was contested civil litigation between  
6 Applied Materials and Defendants.

7 When asked if it was important to her investigation to know whether the state court judge  
8 granted Applied Materials's application for a TRO, SA Trombetta said no. She testified that  
9 knowing that the state court granted Applied Materials's TRO would not have been a fact  
10 supporting probable cause for the search warrant in this case. She stated that she would not include  
11 this fact in a search warrant. SA Trombetta testified that one of the exhibits from Applied  
12 Materials at the January 2013 initial investigation meeting was the stipulated TRO. She testified  
13 that Applied Materials's representatives did not mention at that meeting that there had been a  
14 hearing on Applied Materials's TRO application in the civil litigation. She testified that until she  
15 prepared for this hearing, she had no recollection of Applied Materials's representatives  
16 mentioning that there had been a hearing on the TRO application. She testified that she had told  
17 the prosecutors in this case that she had no recollection of this being mentioned at the meeting. SA  
18 Trombetta testified that she did not ask Applied Materials's representatives at the January 2013  
19 initial meeting what happened at the TRO hearing, and neither did anyone else, to her recollection.  
20 She also did not recall anyone volunteering information about the TRO hearing. When asked if  
21 she thought, in retrospect, it was something that someone might have asked about, SA Trombetta  
22 said no. She testified that she did not think it was important to know if it had been approved or  
23 denied. SA Trombetta confirmed that she could have asked follow-up questions of Applied  
24 Materials's representatives at the January 2013 meeting, as could the prosecutors.

25 When asked about her handwritten notes from this meeting, SA Trombetta confirmed that  
26 she described the four men that were the subject of the investigation as "defendants" by the middle  
27 of the second page. She confirmed she had never met with Applied Materials previously nor knew  
28 anything about its practices and procedures related to protecting trade secrets. She confirmed she

1 learned during the meeting that Applied Materials had previously directed Defendant Chen to  
2 attempt to find a buyer for the MOCVD business. SA Trombetta confirmed this meeting occurred  
3 before the FBI had technically opened the investigation and before she had the chance to read the  
4 binder.

5 SA Trombetta testified that, as a result of the January 2013 meeting, she knew there was a  
6 pending civil case between Applied Materials and Defendants and that she could go to the Santa  
7 Clara County courthouse and look up the docket. SA Trombetta testified that, at the time of the  
8 January 2013 meeting, she did not know that a hearing had been held on the TRO application. She  
9 had not yet reviewed the contents of the binder, including the declarations with December 2012  
10 hearing dates on them. SA Trombetta testified that, from her legal training, she knew applications  
11 for TROs in criminal cases were heard on an expedited basis but that she did know about TROs in  
12 civil cases. She affirmed that she knew that the binder from Applied Materials contained both  
13 declarations in support of and in opposition to the TRO application. SA Trombetta testified that,  
14 after the January 2013 meeting, she and AUSA Callaway decided to apply for a search warrant.  
15 She said they first read everything presented to them and then made that decision approximately  
16 one or two weeks after the meeting. She testified that she believed that AUSA Callaway had read  
17 the materials before the two of them spoke.

18 Defense counsel then showed SA Trombetta Defense Exhibits 30, 31, and 32, which were  
19 reports from SA Trombetta memorializing follow-up questions via email that she asked of Applied  
20 in requests for additional information. Defense Exhibit 33 was a report by SA Trombetta  
21 containing an email exchange between Defendant Chen and EVP Pinto. SA Trombetta testified  
22 that Applied Materials was cooperative in answering questions from her or other government  
23 representatives. She stated that she never asked Applied Materials representatives about the result  
24 of the TRO application, and they never volunteered this information. To her recollection, there had  
25 never been a conversation about it.

26 Defense counsel returned to Defense Exhibit 29, the Declaration of EVP Pinto in support  
27 of Applied Materials's application for a TRO. SA Trombetta testified that she reviewed the  
28 declaration prior to drafting the search warrant affidavit but she was unsure if she relied on this

1 declaration. SA Trombetta testified that she did not believe she had done any other investigation  
2 outside of relying on the materials Applied Materials provided her. She confirmed that her  
3 affidavit omitted that there was civil litigation between Applied Materials and Defendants; that the  
4 litigation related to trade secrets; that she had in her possession sworn statements by Defendants  
5 Chen, Hsu, and Ewald concerning the litigation; that the litigation was filed in December 2012;  
6 that Applied Materials had sought a TRO; and that she did not know the result of that application.  
7 She testified that she did reference the stipulated TRO between Applied Materials and Defendant  
8 Olgado and that the magistrate judge was left uninformed that there was litigation between  
9 Applied Materials and Defendants. SA Trombetta testified that she did inform the magistrate  
10 judge that Applied Materials had provided her with documents. She confirmed that she did not  
11 state that Applied Materials was an interested private litigant. She confirmed that the magistrate  
12 judge did not know that her entire investigation consisted of listening to what Applied Materials  
13 said or reading documents that Applied Materials had provided. She confirmed that the magistrate  
14 judge did not know that she had decided not to include information from the Chen and Hsu  
15 declarations. She also confirmed that the magistrate judge did not know that a state court judge  
16 had denied the TRO application and that she did not know the result of that application.

17 To wrap up its cross-examination, Defense counsel had SA Trombetta compare passages  
18 from EVP Pinto's declaration to her own search warrant affidavit. On several instances, the two  
19 used substantially similar language. SA Trombetta was then asked about the Chen Declaration,  
20 and the Court reminded Defense counsel that the *Franks* hearing was limited in scope to the  
21 omission in the search warrant affidavit of the denial of the TRO. Defense counsel acknowledged  
22 this and stated he had no further questions.

### 23 C. Redirect Examination of SA Trombetta

24 SA Trombetta again reviewed Government Exhibit 1, the search warrant affidavit. She  
25 confirmed she made an explicit reference to the stipulated TRO between Defendant Olgado and  
26 Applied Materials. SA Trombetta also testified that she never worked as a civil litigator while  
27 practicing law and had no idea what the typical timeframe was for acting on a TRO. She testified  
28 that she did not know of any hearings that occurred in December 2012 in the civil litigation. She

confirmed that she specified in the affidavit that she had knowledge of counsel for Olgado providing documents in his possession to Applied Materials.

SA Trombetta also testified that she was not an engineer, and she tracked the language in the Declaration of EVP Pinto because his language describing the MOCVD technology had been concise and to the point. She testified that she was trying to be accurate in her search warrant affidavit. She testified that when she receives information from someone knowledgeable about a certain area, she describes the subject matter in the same way it was described to her when drafting an affidavit. SA Trombetta testified that that is what she did with the information she received from EVP Pinto.

## II. DISCUSSION

### A. Legal Standard

To mount a successful *Franks* challenge, “the defendant must establish two things by a preponderance of the evidence: first, that ‘the affiant officer intentionally or recklessly made false or misleading statements or omissions in support of the warrant[,]’ and second, that the false or misleading statement or omission was material, i.e., ‘necessary to finding probable cause.’” *United States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017) (alteration in original) (quoting *United States v. Martinez-Garcia*, 397 F.3d 1205, 1214–15 (9th Cir. 2005)). “If both requirements are met, ‘the search warrant must be voided and the fruits of the search excluded....’” *Perkins*, 850 F.3d at 1116 (quoting *Franks v. Delaware*, 438 U.S. 154, 156 (1978)).

Under the first step of *Franks*, “[a] negligent or innocent mistake does not warrant suppression.” *Perkins*, 850 F.3d at 1116 (citing *Franks*, 438 U.S. at 171). Under the second step of *Franks*, “[t]he key inquiry is ‘whether probable cause remains once the evidence presented to the magistrate judge is supplemented with the challenged omissions.’” *Perkins*, 850 F.3d at 1119 (quoting *United States v. Ruiz*, 758 F.3d 1144, 1149 (9th Cir. 2014)). “Probable cause to search a location exists if, based on the totality of the circumstances, there is a ‘fair probability’ that evidence of a crime may be found there.” *Perkins*, 850 F.3d at 1119 (citing *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006)).

**B. Intentional or Reckless Disregard for the Truth**

Defendant Olgado argues that the Government was on notice of the pending legal proceeding in which the TRO was denied by the declarations in opposition to the TRO and the stipulated TRO in the binder provided by Applied Materials. Defendant Olgado argues that the Government could have conducted additional investigation to find the result of the TRO, and by not doing so, the Government, as the federal authority, was sending the signal that the state court did not matter. Defendant Olgado argues that this was, at a minimum, reckless to not have investigated further.

The Government argues that there is no evidence that SA Trombetta intentionally omitted the fact that the TRO application was denied, so Defendant Olgado cannot meet his burden under the first *Franks* step. The Government argues that SA Trombetta consistently testified that she did not know about the denial of the TRO, and nothing in the search warrant affidavit is untruthful. The Government argues that the evidence supports SA Trombetta's testimony that she did not know about the denial of the TRO: Exhibit 3, SA Trombetta's report after the January 2013 meeting; Exhibit 4, her handwritten notes from the meeting; Exhibit 6, the letter from Defendant Olgado's counsel to counsel for Applied Materials; and Exhibit 7, the timeline of relevant documents from Applied Materials, all did not mention the denial of the TRO. Further, the Government argues that Defendants have not presented a single case that held an agent was reckless for not monitoring the civil docket in a civil case parallel to a criminal investigation. And finally, the Government argues that Defendant Olgado signed the stipulated TRO on December 17, 2012, which stayed the litigation between him and Applied Materials. Government Ex. 5. Therefore, the denial of the TRO on December 21, 2012, had no bearing whatsoever on Defendant Olgado. *See* Government Ex. 8. The Government argues that the status of the litigation as to the other Defendants is not relevant.

The Court agrees with the Government that Defendant Olgado has not met his burden of establishing was by a preponderance of the evidence that SA Trombetta knowingly and intentionally, or with reckless disregard for the truth, omitted the denial of the TRO from her search warrant affidavit. The Court agrees with the Government that the evidence in the record

1 supports SA Trombetta's credible and consistent testimony that she did not know about the denial  
2 of the TRO. The Court further agrees with the Government that there is no case law that  
3 establishes that a criminal investigator has a duty to monitor a parallel civil lawsuit against related  
4 Defendants when the Defendant whose property is at issue has stipulated to stay the civil litigation  
5 against him.

6 The Court finds *Perkins* and *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985),  
7 amended 769 F.2d 1410 (9th Cir. 1985), distinguishable from this case. In *Perkins*, the Ninth  
8 Circuit reversed a district court's decision in a *Franks* hearing that the investigating agent had not  
9 deliberately or recklessly mislead the magistrate judge by omitting material information from the  
10 warrant application. *Perkins*, 850 F.3d at 1112. In *Perkins*, the defendant had been arrested and  
11 convicted for receipt of child pornography, but the investigating agent left out material details  
12 from the earlier Canadian investigation regarding the same images used to obtain the search  
13 warrant. *Id.* 1112-17. Specifically, the investigating agent omitted these material facts: "(1) the  
14 fact that Canadian authorities dropped the child pornography possession charge against Perkins  
15 because the images were not pornographic; (2) important portions of Constable Ullock's  
16 description of the 989.jpg image; and (3) copies of the images." *Id.* at 1116. The investigating  
17 agent also testified that he was aware of these facts when he submitted the search warrant  
18 affidavit, and the Ninth Circuit found his testimony not credible. *Id.* 1116-17. The case in front of  
19 this Court is distinguishable: the Court finds SA Trombetta's testimony credible, and the evidence  
20 supports her testimony that she was unaware of the denial of the TRO. Even if she had been aware  
21 of the denial of the TRO, the Court does not find this material as to the warrant to search  
22 Defendant Olgado's home, as Applied Materials had already stayed the litigation as to him when  
23 the state court judge denied the TRO.

24 *Stanert* is also distinguishable from this case. *Stanert* addresses what is required of  
25 defendants for a preliminary showing to obtain a *Franks* hearing, but it does comment on the  
26 burden Defendants must meet at the *Franks* hearing itself. 762 F.2d at 781. Further, the evidence  
27 in *Stanert* suggested that the investigating agent was aware of the fact that the defendant had not  
28 been convicted of any charge, a fact that was omitted from the warrant that mentioned that the

1 defendant had been arrested. *Id.* Here, all the evidence suggests that SA Trombetta was not aware  
2 of the denied TRO.

3 The Court finds that SA Trombetta's omission of the denial of the TRO was, at most,  
4 negligent, and therefore Defendants have failed to prove by a preponderance of the evidence that  
5 SA Trombetta's omission was intentional or made in reckless disregard for the truth.

6 **C. Materiality**

7 Since Defendants have failed to establish the first prong required for a successful *Franks*  
8 challenge, the Court need not reach the arguments on materiality. The Court does note that, even if  
9 the search warrant affidavit were supplemented with the denial of the TRO, the fact that Defendant  
10 Olgado was no longer a part of the litigation would have necessarily been included in order for the  
11 affidavit to accurately capture the status of the state court litigation.

12 **D. Conclusion**

13 The Court concludes that Defendant Olgado has not met his burden under *Franks* and  
14 established by a preponderance of the evidence that the challenged omission was intentional or  
15 made with reckless disregard for the truth.

16  
17 **III. ORDER**

18 Defendants' motion to suppress evidence is DENIED.

19  
20  
21 Dated: March 26, 2021



22  
23 BETH LABSON FREEMAN  
United States District Judge